In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-899

LOUIS GUSTAV LEFAIVRE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 507 F. 2d 1288.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1974. A timely petition for rehearing *en banc* was denied on December 23, 1974. The petition for a writ of certiorari was filed on January 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioners violated the Travel Act by cashing of out-of-state checks in connection with their illegal gambling operation.

2. Whether, contrary to its plain language, a requirement of substantial use of interstate facilities should be read into the Travel Act.

3. Whether in a prosecution for conspiracy to violate the Travel Act each conspirator must be shown to have known that interstate facilities were being used in furtherance of the conspiracy.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioners, Louis Gustav LeFaivre, Louis Gustav LeFaivre, Jr., Sheila Elizabeth Eckert, and Norma Leigh Miller, and others were convicted of offenses involving the use of interstate facilities in aid of a gambling enterprise, in violation of 18 U.S.C. 1952 (the Travel Act).[1] Petitioners were each convicted of one count of conspiracy to violate the Travel Act and eleven counts charging substantive violations of the Travel Act. Petitioner Louis LeFaivre, Sr. was sentenced to the custody of the Attorney General for study and report pursuant to 18 U.S.C. 4208(b). Petitioner Louis LeFaivre, Jr. was sentenced to twelve concurrent one-year prison terms. Petitioners Sheila Eckert and Norma Miller were each sentenced to twelve concurrent nine-month prison terms.

1. The evidence showed that petitioner Louis LeFaivre, Sr., also known as Gus Funk, was the backer for a large numbers business that operated from his restaurant in Baltimore, Maryland, from 1967 to 1971 (Tr. 139, 349, 412, 435, 454, 487, 520-521, 545, 595, 615). LeFaivre's

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[1]Co-defendant Paul Hawse was also convicted of conspiracy and substantive offenses under 18 U.S.C. 1952. He was given a three-year sentence on the conspiracy count and concurrent three-year sentences on the twelve substantive counts. Co-defendants Raphael Nini, Joseph Joel Donati, Sam Clark, William Howard Phillips, Harry Carroll Stuller, Henry Joseph Sibiski, Samuel Edward Arthur, Howard Pemberton Brown, and Julius Askins all pleaded guilty to one count of the indictment. Co-defendant Augustine Charles Tamburello was acquitted of all charges against him.

son, petitioner Louis LeFaivre, Jr., and co-defendant Paul Hawse were his immediate subordinates in the operation (Tr. 105, 155), while his two daughters, petitioners Norma Leigh Miller and Sheila Elizabeth Eckert, were in charge of receiving and recording the daily bets taken over the telephone (Tr. 165-187, 437-438).[2]

LeFaivre, Sr. backed bets that were taken by number writers in various locations in the city. Most of the writers were employed at various jobs and would write numbers for their fellow employees. The writers would take numbers on a daily basis and then report them by telephone (Tr. 143, 352, 437). The writers received 15 percent to 20 percent on the numbers they wrote, with the remainder to LeFaivre, Sr. (Tr. 141, 415). Customarily, the bettors would not pay for their bets on a daily basis but instead would settle their accounts with the writer on Friday, which was usually payday. In order to collect for the bets that had been made during the week, the writers would often cash the bettor's payroll and other checks (Tr. 180, 355, 437, 526). In fact, as a number of writers testified, cashing checks was an essential part of the system, without which the numbers operation could not have existed (Tr. 150-151, 275, 521).

After the writers had collected from the bettors on Friday, they would take the cash and checks to LeFaivre, Sr. to settle with him (Tr. 150, 355, 415, 436, 521, 595). LeFaivre, Sr. would take the proceeds from the writer and deduct their commission of either 15 percent or 20 percent (Tr. 192). When checks were given in payment, each writer would put an identifying mark on the check so that, if the check bounced, LeFaivre, Sr. would know whom to hold responsible (Tr. 171, 193). LeFaivre, Sr. would then cash the checks, between thirty and seventy-five a week, at

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[2]Petitioner Miller was also shown to have cashed checks occasionally (Tr. 511).

one specific branch office of a Maryland bank (Tr. 375). The average amount of business for a particular writer varied. Some wrote up to one thousand dollars in bets a week, while others wrote about two thousand dollars weekly (Tr. 163).

In payment of debts by the bettors, and in settlement between the writers and LeFaivre, Sr., checks drawn on both local and out-of-state banks were used. At trial, the government introduced fourteen checks drawn on out-of-state banks that had been used by the various writers to settle their weekly accounts with LeFaivre, Sr.

Twelve of these checks (Government exhibits 1-4, 11-14, 17-20) bore LeFaivre, Sr.'s endorsement, while one was endorsed by co-conspirator Arthur Suter (Government exhibit 16). All of these checks were cashed at the Baltimore bank where LeFaivre, Sr. maintained two checking accounts; they were then sent through the facilities of interstate commerce to be cleared (Tr. 654, 660-668). Nine of these checks were checks drawn on out-of-state banks (Government exhibits 1-4, 13, 14, 17, 19, 20), four were United States Treasury checks (Government's exhibits 11, 12, 15, 16) and one was a telegraphic money order drawn on the Chase Manhattan Bank (Government's exhibit 18).

ARGUMENT

1. The holding of the court below that the cashing of out-of-state checks in a gambling operation comes within the purview of the Travel Act does not create a conflict in the circuits that warrants review by this Court; it is consistent with similar decisions by the Court of Appeals for the Fifth Circuit, in *Hanley* v. *United States*, 416 F. 2d 1160, certiorari denied, 397 U.S. 910, and the Court of Appeals for the Sixth Circuit, in *United States* v. *Barnes*, 383 F. 2d 287, certiorari denied, 389 U.S.

1040, as well as a previous decision by the Court of Appeals for the Fourth Circuit, in *United States* v. *Salsbury*, 430 F. 2d 1045.

While the Seventh Circuit has reversed Travel Act convictions involving the use of checks, none concerned a factual situation parallel to that presented here. In *United States* v. *Altobella*, 442 F. 2d 310 (C.A. 7), a single out-of-state check was used as the pay-off in an extortion scheme, while in *United States* v. *Isaacs*, 493 F. 2d 1124, 1146 (C.A. 7), certiorari denied, 417 U.S. 976, three checks used in a bribery scheme were drawn on an Illinois bank, cashed in Illinois, and cleared through the Federal Reserve Bank in St. Louis, Missouri. Indeed, in *Isaacs* the court stated its approval of the Fourth Circuit's decision in *United States* v. *Salsbury, supra* (493 F. 2d at 1148-1149).[3]

The Seventh Circuit has adopted what it calls a more "restrictive" test for reviewing Travel Act convictions. Compare *United States* v. *Isaacs*, *supra*, 493 F. 2d at 1146-1149, with opinion below (Pet. App.); *United States* v. *Salsbury*, *supra*, 430 F. 2d at 1048; and *United States* v. *Barrow*, 363 F. 2d 62, 65 (C.A. 3).[4] The cases arising in the Seventh Circuit have involved the incidental use of interstate facilities wholly unlike petitioners' regular check cashing operation. Given the wholly dissimilar

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[3] *United States* v. *Archer*, 486 F. 2d 670 (C.A. 2), does not present a conflict. That case "went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable" (486 F. 2d at 685-686; statement on denial of rehearing).

[4] The Seventh Circuit test is two-pronged: (1) the use of interstate facilities must be a conscious decision and not a matter of happenstance, and (2) the use of the interstate facilities must be a continuous one that is central, not incidental, to the illegal operation. The Fourth and Third Circuits have both stated that the use of interstate facilities need not be an integral part of the unlawful operation or essential to it, but only need facilitate the illegal activity.

nature of cases presented in the two circuits, it cannot be said how the Seventh Circuit would decide a case with facts like these.

2. The court below held that cashing out-of-state checks to settle accounts in a numbers operation constituted a violation of the Travel Act. In reaching this decision, the court stated that the standard to apply in reviewing Travel Act convictions is whether the conduct involved fits within the plain language of the statute, *i.e.*, is there a use of interstate facilities with intent to carry on or facilitate or promote any one of the illegal activities, coupled thereafter with a performance of or attempt to perform the illegal enterprise (Pet. App. 15a).

Petitioners contend that reviewing Travel Act convictions by reference to the plain language of the statute entails an unduly expansive reading of 18 U.S.C. 1952. Instead, they contend, the Travel Act should apply only where there is a substantial use of interstate facilities that are in addition, essential to the operation of the illegal activity. Otherwise, petitioners assert, the Travel Act would "* * * convert a substantial number of essentially state crimes into federal violations by the fortuitous and incidental use of interstate facilities and, as a result, would seriously upset the traditional federal-state balance" (Pet. 14). Petitioners cite this Court's decision in *Rewis* v. *United States*, 401 U.S. 808, in support of this assertion.

We agree with the court below (Pet. App. 10a) that there is no requirement of substantiality in the Travel Act and no reason to read one into it. As the court said (Pet. App. 10a):

> We reiterate that the facts bring this case squarely within the *plain language* of the Travel Act. The Congress chose to trigger application of the Travel Act by the use of "any facility in interstate or foreign

commerce." It did not provide that such use must be "substantial" nor, so far as we can ascertain, has it ever done so in any other federal criminal statute pegged to the use of interstate facilities.[5]

Similarly, like the court below (Pet. App. 10a-13a), we do not believe this case constitutes the type of improper expansion of the Travel Act condemned by this Court in *Rewis*. In *Rewis*, this Court considered Travel Act convictions based on the travel on interstate highways of customers from Georgia to the defendants' gambling establishment in Florida. There was no evidence in *Rewis* that the defendants encouraged out-of-state bettors to patronize their establishment. In reversing the convictions, this Court held that to allow Travel Act convictions based solely on interstate travel of bettors would create an expansive Travel Act that could alter sensitive Federal-State relationships, overextend limited federal police resources, and produce situations in which the geographic origin of a customer, a matter of happenstance, would transform relatively minor state offenses into federal felonies (401 U.S. at 812).

Here, the facts are significantly different. Petitioners, not their customers, used the interstate facilities. Additionally, cashing checks in petitioners' numbers business was not a matter of happenstance, but rather an essential feature of the illegal operation. Accordingly, *Rewis* lends no support to petitioners' argument and is clearly distinguishable.

Moreover, we fail to see how sustaining a Travel Act conviction based on the plain language of the statute constitutes an expansive reading of it. Rather, we believe

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[5]We believe there is no conflict with the decision in *United States* v. *Presley*, 478 F. 2d 163, 168 (C.A. 5). In *Presley*, the court merely stated that in determining whether as a matter of law a Travel Act violation is established, it may be necessary to submit the issue to the jury for fact-finding as to the use of the interstate facilities and their relation to the illegal activity.

that petitioners are urging a restrictive reading of the Act, at variance with its plain language and contrary to the clear intent of Congress.

3. At trial, petitioners requested an instruction that in order to be found guilty of conspiracy to violate the Travel Act, it must be found that each conspirator knew or should have known of the use of interstate facilities. This instruction was properly rejected by the trial court (Tr. 771-772). Instead, the court instructed the jury, in pertinent part, that to convict for conspiracy to violate the Travel Act they must find that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment (all of which invovled cashing out-of-state checks) (Tr. 948-949).

This instruction was proper, allowing conviction of all parties to the illegal activity if one of them knowingly performed an overt act in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640, 646-647. There is no requirement that each conspirator have knowledge of every detail of the conspiracy, so long as they agreed to its essential plan. *Blumenthal* v. *United States*, 332 U.S. 539, 557; *United States* v. *Roselli*, 432 F. 2d 879, 891-892 (C.A. 9). Here, the evidence clearly supported a finding that petitioner LeFaivre, Sr. and others knowingly made use of interstate facilities in furtherance of the gambling conspiracy and that the conspiracy involved the other petitioners, LeFaivre, Jr., Miller, and Eckert.

However, as petitioner notes, this conclusion conflicts with the holding of the Court of Appeals for the Sixth Circuit in *United States* v. *Barnes*, 383 F. 2d 287, certiorari denied, 389 U.S. 1040, that each conspirator must be shown to have knowledge of the use of interstate facilities. This Court is presently considering, in *United States* v. *Feola*, No. 73-1123, argued November 19, 1974, whether proof of knowledge of a federal jurisdictional

element is ever required in federal conspiracy prosecution. Accordingly, the Court may wish to hold this case pending the decision in *Feola* and dispose of the petition in accord with that decision.

If this Court reverses the court of appeals in *Feola* and holds that knowledge of the federal jurisdictional element is not required, certiorari should be denied in this case, since the Sixth Circuit presumably would no longer follow its decision in *Barnes*. If, on the other hand, the Court affirms in *Feola*, it does not necessarily follow that the decision of the court below was wrong. *Feola* involves a conspiracy to assault federal undercover agents; none of the defendants were shown to have had knowledge of the officers' federal status. Here, by contrast, LeFaivre, Sr. and others made knowing use of interstate facilities in a conspiracy involving others. Thus, even if it is held in *Feola* that at least some of the conspirators must be shown to have had knowledge of the federal jurisdictional element, these convictions should stand. See *Pinkerton* v. *United States, supra,* and *Blumenthal* v. *United States, supra*. Under the circumstance of an affirmance by this Court in *Feola*, the proper disposition of this issue in the instant case will likely depend on the analysis of the issues in the *Feola* decision.

Respectfully submitted.

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MARCH 1975.